

U.S. Department of Labor

Office of Administrative Law Judges
11870 Merchants Walk, Suite 204
Newport News, VA 23606

(757) 591-5140 (TEL)
(757) 591-5150 (FAX)



Issue Date: 01 April 2004

Case No. 2001-LHC-1134

OWCP No. 5-97368

In the Matter of

YANCY D. HARRELL,
Claimant
v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,
Employer

Appearances:

John H. Klein, Esq., for Claimant
Jonathan H. Walker, Esq., for Employer

Before:

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION ON REMAND

This proceeding involves a claim for compensation by the Claimant, Yancy D. Harrell, covered by the Longshore and Harbor Workers' Compensation Act, as amended 33 U.S.C. §901 *et seq.* (hereinafter referred to as the "Act").

The claim was referred by the Director, Office of Workers' Compensation Programs to the Office of Administrative Law Judges for a formal hearing in accordance with the Act and the regulations issued thereunder. A formal hearing was held on September 12, 2001. (TR).¹ A decision and order was issued on October 17, 2002, finding that Claimant made a prima facie showing of disability under the Act and that Employer had established suitable alternate employment. The decision and order also found that Claimant did not conduct a reasonable and diligent job search, and therefore, Claimant's claim for total disability from April 6, 2000, to the present and continuing was denied.

¹ EX – Employer's exhibit; CX – Claimant's exhibit; TR – Transcript; D&O – Original Decision & Order issued by ALJ October 17, 2002; BRB – Decision & Order of Remand issued by the Board October 30, 2003.

By a decision and order dated October 30, 2003, the Benefits Review Board (“BRB” or “Board”) affirmed the finding that Employer established the availability of suitable alternate employment. (BRB, at 3). The Board vacated and remanded this matter for further consideration of whether Claimant conducted a reasonable and diligent job search. (BRB, at 5). An order was issued on February 2, 2004, permitting the parties thirty days in which to submit briefs addressing the issues raised in the Board’s decision. Claimant submitted his Brief on Remand on March 2, 2004. Employer submitted its Brief on Remand on March 3, 2004.

The findings and conclusions which follow are based on a complete review of the record in light of the argument of the parties, applicable statutory provisions, regulations, and pertinent precedent.

ISSUE

The sole issue to be decided on remand is whether Claimant made a reasonable and diligent attempt to secure alternate employment following his layoff from Employer.

STIPULATIONS

At the September 12, 2001, hearing, Claimant and Employer stipulated, and I find:

1. That an employer/employee relationship existed at all relevant times;
2. That the parties are subject to the jurisdiction of the Act;
3. That Claimant sustained an injury to his left knee out of and in the course of his employment on November 20, 1995;
4. That a timely notice of injury was given by Claimant to Employer;
5. That a timely claim for compensation was filed by Claimant;
6. That Employer filed a timely first report of injury with the Department of Labor;
7. That the injury to Claimant’s knee resulted in a 15% permanent partial disability rating for his left knee;
8. That Claimant’s average weekly wage at the time of his injury was \$716.39, resulting in a compensation rate of \$477.59;
9. That Claimant reached maximum medical improvement (MMI) on October 23, 1996;
10. That Claimant’s post-injury light-duty job at the shipyard was within his restrictions;

11. That Claimant is not able to return to his pre-injury employment at Newport News Shipbuilding.

(TR at 6-11, 16).

DISCUSSION OF LAW AND FACTS

In remanding this matter, the Board found that the inquiry as to whether Claimant diligently sought employment was not broad enough, and focused solely on Claimant's general inquiry with local businesses as to whether those businesses were hiring, but did not examine with any specificity any of the jobs that Claimant pursued. (BRB, at 4). The Board also rejected any requirement that Claimant seek out prospective employers who are actually hiring, finding that to do so "imposes an additional limitation which is not determinative of claimant's diligence." (BRB, at 5). The Board reasoned that this fact would provide probative evidence as to the availability of jobs in the local market. (BRB, at 4-5).

The Board directed that, on remand, "specific findings" be made "regarding the nature and sufficiency of claimant's alleged efforts in order to determine whether claimant did in fact diligent [*sic*] try, without success, to find another job." (BRB, at 4 (citing *Palombo v. Director, OWCP*, 937 F.2d 70 (2d Cir. 1991))). The Board specifically directed that "[i]f claimant unsuccessfully attempted to gain employment with one of the specific employers identified by employer, the administrative law judge must consider whether that position was actually available." (BRB, at 4 fn.2 (citing *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988))). The Board also specifically directed the ALJ to consider "[t]he relevancy of whether or not an application was filed with employers who either were not hiring or who had no positions available within claimant's physical restrictions." (BRB, at 5 fn.3). In addition, the Board directed that both Claimant's evidence and Employer's contrary evidence be addressed and that particular jobs relied upon by Claimant be discussed "to determine whether claimant was genuinely seeking alternate employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available." (BRB, at 4 (citing *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199 (4th Cir. 1984))).

Once an employer meets its burden of showing that suitable alternate employment is available to a claimant if that claimant diligently seeks it, the claimant bears a complementary burden and "may still establish disability by showing that he has diligently sought appropriate employment but has been unable to secure it." *Newport News Shipbuilding & Dry Dock Co. v. Tann*, 841 F.2d 540, 542 (4th Cir. 1988) (citing *Trans-State Dredging*, 731 F.2d at 200); *see also New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1043 (5th Cir. 1981). Further, the claimant need not seek jobs identical to those identified by the employer as suitable alternate employment. *Palombo*, 937 F.2d at 74. The employment need only be "within the compass of employment opportunities shown by the employer to be reasonably attainable and available." *Trans-State Dredging*, 731 F.2d at 202. However, the jobs that a claimant seeks must be "appropriate" and consistent with the claimant's physical restrictions. *See Tann*, 841 F.2d at 543-44 (finding that claimant's work as a farmhand was not appropriate work given that claimant was physically restricted from doing extensive lifting, climbing, walking, and standing). Further, if a claimant "offers evidence that he diligently tried to find a suitable job, . . . the ALJ should

make specific findings regarding the nature and sufficiency of claimant's alleged efforts." *Palombo*, 937 F.2d at 75. The likelihood of a finding that the claimant diligently sought employment is reduced where the claimant fails to seek employment for a significant period of time. *Tann*, 841 F.2d at 544. The claimant also bears the burden of showing that he is willing to work. *Trans-State Dredging*, 731 F.2d at 201. The Board has previously held that injured claimants must cooperate with vocational consultants, and failure to do so may contribute to a finding of lack of willingness to work. *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99, 102 (1985).

If a claimant proves that he diligently sought employment, the finding of total disability may be reinstated. *Palombo*, 937 F.2d at 75; *Tann*, 841 F.2d at 542. If a claimant does not meet his burden of proof as to whether he diligently sought employment, the claimant will be considered only partially disabled and will be limited to the recovery that is provided for in the applicable schedule under Section 8 of the Act. 33 U.S.C. §908(c) (2002); *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 274 (1980); *Gilchrist v. Newport News Shipbuilding & Dry Dock Co.*, 135 F.3d 915, 918 (4th Cir. 1998).

Claimant's Testimony Regarding His Job Search

Claimant testified that he looked for work after he was laid off at the shipyard on April 6, 2000. (TR. at 24). According to Claimant, while he was collecting unemployment benefits, he worked with the North Carolina Employment Commission's job search program. (TR. at 25). In this program, Claimant stated that he was required to keep list of places of potential employment that he contacted, and that he was required to contact at least two potential employers per week in order to collect unemployment benefits.² (TR. at 27-28, 37).

Claimant also testified that he received correspondence through the mail from a rehabilitation counselor for Employer which contained a list of possible places of employment. (TR. at 28-29, 37). According to Claimant, he visited each of the businesses on the list, but that there were no jobs available at any of businesses. (TR. at 28-29). Claimant further testified that he has not been offered any job since being laid off by the shipyard on April 6, 2000, that he has not turned down any employment since being laid off, and that he was not working at the time of the hearing. (TR. at 30, 33; EX 7, at 7). Claimant also testified that he did not meet with Mr. Kay to discuss jobs. (TR. at 36-37).

During his testimony, Claimant referenced CX 3, Claimant's job search records. Claimant testified that he created the list and contacted all of the places listed. (TR. at 30-31). Claimant stated that some of the businesses he visited had job openings but that he was not hired for those positions. (TR. at 31). However, Claimant also testified that when he visited these businesses, he did not know if the businesses had any job openings, nor did he know what kind of positions the businesses had available, if any. (TR. at 31-32). According to Claimant, when visiting the potential employers listed in his records, he "went in there to see what they had . . . for my restrictions" but that the businesses did not have any positions within his restrictions. (TR. at 32). Claimant would have considered accepting jobs within his restrictions. (TR. at 32).

² Claimant testified that he collected unemployment benefits for twenty-six weeks. (TR. at 28).

Employer deposed Claimant on July 6, 2001, at which time Employer questioned Claimant regarding his job search activities. (EX 7). Claimant testified that he kept a record of the jobs he looked at. (EX 7, at 7). Claimant also discussed several of the jobs about which he inquired. Claimant stated that he inquired about a “farm job” with Mr. Chester Powell in Harrellsville on April 26, 2000, which would have entailed “working on a tractor, setting up peanuts, corn, tobacco.” (EX 7, at 8). Mr. Powell was looking for someone to do that job in April, 2000, and Claimant asked to be hired. However, Mr. Powell felt that Claimant could not get up on the tractor or handle the tractor and switching gears because of the trouble with his legs. (EX 7, at 8-9). Claimant stated that he knew prior to visiting Mr. Powell that he could not climb onto a tractor but that he “had to do it to get unemployment compensation.” (EX 7, at 10).

Claimant also testified that he inquired about a “store job” at Duck-Thru on April 26, 2000, because his “sister-in-law had a job there at that time hiring people” and that he was not hired but did fill out an application. (EX 7, at 10). According to Claimant, there was a job open there at the time he applied, and that he “tried to do the job,” which consisted of cleaning up the store and parking area, for approximately one hour, but fell down when he had to bend his knees to pick something up. (EX 7, at 10-12). After he fell down, his sister-in-law would not let him do the job any longer. (EX 7, at 12). Claimant stated that he was unable to stand for more than twenty or thirty minutes at a time; at the time, he did not think that he could do the janitorial work, but that he tried to do it. (EX 7, at 13).

Claimant was next questioned about a job at Carolina/Easo Aluminum that he listed in his job records. Claimant stated that there were no jobs available when Claimant inquired there on May 1. (EX 7, at 13-14). Claimant also inquired about a job at Georgia Pacific, a lumber mill. Claimant “went there to apply for anything they had” but he did not know if anything was available. He stated he “just went there because I had to do my job search.” (EX 7, at 14). He learned that Georgia Pacific was hiring for yard upkeep, janitorial-type services, and driving a trash truck. (EX 7, at 15). Claimant also stated that part of the job would include “hopping on tractors” and that, despite having a restriction against climbing, he would have tried to do that part of the job. (EX 7, at 17-18). According to Claimant, Georgia Pacific was hiring, but did not want to hire Claimant because he could not walk or move around easily; therefore, he did not fill out an application. (EX 7, at 14, 16).

Claimant stated that he also went to Advance Auto Parts to look for a job, but that the store was not hiring at that time. He went there because he needed to document some employers for his job search. (EX 7, 18-19). Claimant also went to Golden Skillet restaurant, which was hiring for cooking and cleaning positions. He understood that those positions would require him to stand all day, and that he knew he could not do that type of work because of his restrictions. Claimant found out about the jobs at Golden Skillet because he dines there often. (EX 7, at 19-20). Claimant testified that he visited a Burger King in Ahoskie, North Carolina, to document a job search, but that there was nothing that the workers there did that he felt like he could do. (EX 7, at 20).

Next, Claimant discussed going to Freemason Metal Products, stating that he was told the business did not have any positions for him within his physical restrictions. Again, Claimant

testified that he went there to document the visit for his job search to collect unemployment benefits. (EX 7, at 20-21). When asked whether he thought there were any jobs at Freemason Metal Products that he felt like he could do, Claimant initially answered "Yes" but then stated that there were no jobs there that he thinks he could have performed. (EX 7, at 21). Claimant also stated that there were no jobs at the Popeye's Restaurant or at Harrellsville Machine Welding that he thought he could do within his restrictions. (EX 7, at 21).

Claimant testified that he filled out an application at the Wal-Mart in Ahoskie to apply for "just anything at that time." (EX 7, at 22). Wal-Mart accepted this application, but he was never contacted for a job. (EX 7, at 23). According to Claimant, he never followed up on any applications after May 28, 2000. (EX 7, at 23).

As to Ace Hardware, Claimant testified that he was told there were no jobs there for him, as any of the jobs would require a great amount of walking. (EX 7, at 24). Likewise, Ahoskie Tire Service did not have any jobs that met his requirements. Claimant visited these businesses to fulfill his job search requirement. (EX 7, at 24-25).

Claimant also went to the Piggly Wiggly grocery store, where he felt he could work as a cashier if he "could stop [his] knees and stuff from popping and hurting," though Claimant did not think that he could stand for the entire shift. (EX 7, at 25). However, in speaking with Jerry Olphin, the manager, he learned that there were no positions available at Piggly Wiggly. Claimant started to fill out an application but was told not to by the manager. (EX 7, at 25-26).

Claimant did not get a job at Lee's Tractor Company, which, according to Claimant, builds, sells, and repairs tractors. Claimant testified that he had no experience in building, selling, or repairing tractors, though he thought he could possibly get a cleaning job there. However, Claimant stated that Lee's Tractor Company was not looking to hire anyone at the time. (EX 7, at 27-28). Claimant responded to a job ad placed by O'Connors Restaurant for cleaning and cooking positions, but stated that he could not have performed those tasks because of the constant standing. (EX 7, at 30-31).

Claimant also testified that there were also no jobs that he thought he could do within his restrictions at Rose Brothers Paving Company; Brown's Mobile Home Sales; McDonald's Restaurant; Popeye's Restaurant; Advance Auto Parts; or Howell Metal Corporation. (EX 7, at 31-32). The same was true for the Machine Shop in Murfreesboro, North Carolina; Roofing Service in Ahoskie; the Food Lion in Ahoskie; Lucas Machine and Welding Company; Kentucky Fried Chicken in Ahoskie; Basnight Company; Commercial Ready Mix Products; Pizza Inn in Murfreesboro; Harrell's Hardware Company; NAPA Auto Parts; Butler FS General Contractor; Brown Wayne Tree Service; and Ahoskie Fertilizer Company. Claimant also testified that there were no jobs within his restrictions at Hunter's Funeral Home; Ahoskie Grade School; Good News Auto Parts; Flood's Auto Repair; Producer's Gym Warehouse; and Bill's Power Cleaning. (TR. at 31-35).

Claimant further testified that he went to all of the following business to fulfill the job search requirement: Ashton Lewis Lumber Company; ECH Company; D&V Construction; Commercial Ready Mix Products; Tinkum Construction; Whitley RO Inc.; Golden Skillet; Red

Apple Market; Smith's Machine Welding; Parker's Peanut Warehouse; Ayers Ervin Roofing Service; High's Ice Cream Store; Severn Peanut Company; Northampton Peanut Company; Harry Wynn's Fish Company; Brown Peanut Company; Hertford County Auto Parts; Hunter's Funeral Home; Taco Bell; Sutton Company; Sussems Parking Company; Union Sand Gravel; Ridgeway; Riverside Auto Mart; and Machine and Welding, Inc.. (TR. at 36). None of these locations had work that Claimant could do, but that some of them were advertising or hiring for positions when he visited the businesses. However, Claimant stated that although he did not think that he could perform some of the positions advertised, he visited the businesses anyway in order to fulfill the job search requirements. (TR. at 36-37).

Claimant testified that he did not look for any jobs after January 10, 2001, because he started having car problems and was without transportation. He stated that his car was still broken down at the time of the hearing and that, along with his wife, he drove to the hearing in his stepdaughter's car. (TR. at 37-39). Claimant testified that he cannot use his stepdaughter's car for transportation to and from a job because that car is her only form of transportation, and that she needs the car to get to her job. (TR. at 38). Claimant also stated that there is not a bus system where he lives in North Carolina. (TR. at 39).

Vocational Consultant William Kay's Testimony Regarding Claimant's Job Search

Mr. William Kay testified that, as is routine with his position as vocational consultant, he attempted to schedule a meeting with Claimant prior to completing a labor market survey. (TR. at 44). Mr. Kay sent letters to Claimant by both certified and regular mail on May 3, 2000. (TR. at 44). However, Mr. Kay was not permitted to meet with Claimant at the direction of Claimant's counsel because Mr. Kay was not providing vocational services but instead was only conducting a labor market survey. (TR. at 46, 80; EX 8b). Therefore, Mr. Kay proceeded to complete a labor market survey without the benefit of meeting with Claimant; instead, he used records provided by Employer, which consisted of medical records and personnel information. (TR. at 46-47).

Mr. Kay reviewed Claimant's Exhibit 3, and sent letters to the employers identified therein to determine whether Claimant applied for jobs with these employers. (TR. at 56). Mr. Kay testified that he received seven responses, with one of the responses indicating that Claimant had actually filled out an application for that particular job. (TR. at 57, 65-66). The other responses indicated either that Claimant had not completed a job application or that they had no record of Claimant completing a job application. (TR. at 57). Mr. Kay indicated that four letters were returned because of address problems, including one for "Earl's Body Shop" in Ahoskie, North Carolina. (TR. at 57).

Upon cross-examination, Mr. Kay also testified that the letters he sent did not specifically ask whether Claimant had made contact at that particular business, but instead asked only if that business received an application from Claimant. (TR. at 88). Mr. Kay also stated that Claimant could have contacted businesses but that the businesses that were not hiring may not have given him an application to complete. (TR. at 88-89).

The letters that Mr. Kay sent to potential employers identified in Claimant's Exhibit 3 were admitted into evidence as Employer's Exhibit 9. The exhibit consists of copies of seven letters sent by Mr. Kay and returned by the businesses. The letters included a space at the bottom that Mr. Kay asked the business to complete, which asked whether an application was received from Claimant and whether Claimant was being considered for a position at that business. An area for comments was also provided. (EX 9). The letter sent to Howell Metal Corp. in Murfreesboro, North Carolina, was completed by a person (whose signature is illegible) who wrote that their title was "President." (EX 9a). The letter notes that an application was received from Claimant but that he was not under consideration for hire. In the comments section, "Not hiring now" was written. (EX 9a). The remaining six letters went to businesses who replied that they had not received an application from Claimant. These letters were sent to and returned by: Ace Hardware, Ahoskie, North Carolina; Ashton Lewis Lumber Company, Gatesville, North Carolina; Food Lion, Murfreesboro, North Carolina; Food Lion, Ahoskie, North Carolina³; Rent Way, Ahoskie, North Carolina; and Red Apple, Ahoskie, North Carolina. (EX 9a-g).

Employer's Exhibit 9 also contains copies of four envelopes (which contained letters at one point) that were returned to Mr. Kay for various reasons. These letters were sent to Riverside Auto Mart, Ahoskie, North Carolina (returned as "Not Deliverable as Addressed—Unable to Forward"); Duck Thru, Cofield, North Carolina (returned for "No Mail Receptacle"); Rose Brothers Paving Company, Murfreesboro, North Carolina (returned as "Forwarding Order Expired"); and a fourth letter was returned as "Address Unknown." (EX 9h-i). A discussion on the record clarified that the fourth envelope was originally addressed to Earl's Body Shop in Ahoskie, North Carolina. (TR. at 76).

Claimant's Job Search Records

Claimant's Exhibit 3 consists of Claimant's job search records. The list contains 80 entries made by Claimant when he allegedly contacted businesses regarding jobs, and includes all of the businesses about which Employer questioned Claimant during his deposition. For almost all of the businesses, Claimant listed a business name and address and the date on which he visited the business. In addition, there are five additional businesses that were not addressed during Claimant's deposition: Pepsi Cola Bottling Company, Elizabeth City, North Carolina; Murfreesboro Inn, Murfreesboro, North Carolina; Ahoskie Building Supplies, Ahoskie, North Carolina; Planter's Hardware, Murfreesboro, North Carolina; and East Coast Environmental, Aulander, North Carolina. (CX 3i, 3r, 3t, 3nn).

Arguments

In his Brief on Remand, Claimant asserts that he did, in fact, diligently seek work, and asserts that the record contains "more than ninety employers, including some employers listed on the Employer's labor market survey" but that Claimant was not hired by any of these businesses. (Claimant's Brief on Remand, at 2). Claimant maintains that the Board has rejected the

³ Instead of returning the letter sent by Mr. Kay, a representative from Food Lion in Ahoskie, North Carolina, telephoned Mr. Kay on August 24, 2001, and told Mr. Kay that no application had been received from Claimant. This is noted by a notation on a copy of the letter sent to that store. (EX 9e).

argument that Claimant was not diligent in his job search because he did not file applications with the businesses he contacted, because if a businesses was not hiring, Claimant should not have been expected to apply for a job that was not available. (Claimant's Brief on Remand, at 2-3). Claimant maintains that the record contains "ample evidence" to determine that Claimant was diligent in seeking alternate work, as Claimant is "[a]n uneducated shipyard worker, with absolutely no experience or vocational job search training" who "contacted more than ninety employers in his job market." (Claimant's Brief on Remand, at 3).

Claimant also "point[s] to his brief previously filed in this case. (See Attachment 1, pages 14-16)," apparently wishing to incorporate his previous argument at this stage of the proceedings as well. In his earlier brief, Claimant argued that he diligently sought employment despite living in a rural community, not having "any job placement assistance from the Department of Labor," and having "no other experience or training in locating employment." According to Claimant, his local community is "a depressed labor market with very little industry" and is rural and agricultural in nature. Claimant asserted that he signed up with the Unemployment Commission of North Carolina, for which he was required to search for at least two jobs per week, and that this procedure of contacting potential employers was reasonable and "highly recommended" by the North Carolina Unemployment Commission. (Claimant's Brief on Remand, Attachment 1, at 15). Claimant also argued in his previous brief that Claimant's "job search efforts *mirror* that of employer's expert" who "testified that in locating jobs for Mr. Harrell he searched the phonebook and contacted the employers." (Claimant's Brief on Remand, Attachment 1, at 16 (emphasis in original) (citing TR. at 84)).

In its Brief on Remand, Employer submits that it has already paid Claimant the compensation he is entitled to under Section 8(c)(2) of the Act and that Claimant is not entitled to additional compensation since his inability to work is not caused by his injuries. (Employer's Brief on Remand, at 1). Employer emphasizes that Claimant contacted the businesses on his job search list only to receive unemployment compensation, as Claimant knew he could not perform most of the possible jobs those businesses might have had available. (Employer's Brief on Remand, at 5-6). Employer also stresses that Claimant did not document any businesses that he contacted for potential employment after January 10, 2001, and argues that Claimant did so because he was no longer eligible to receive unemployment compensation, despite Claimant's testimony that it was approximately that time period when he began to have transportation problems. (Employer's Brief on Remand, at 6-7).

Employer asserts that Claimant has not established that he has a genuine desire to work nor has he made a diligent attempt to obtain alternate employment. In support of this argument, Employer cites the fact that Claimant did not know whether the businesses had any jobs available when he contacted them and that even if the businesses had work, Claimant knew he could not perform the necessary tasks. (Employer's Brief on Remand, at 7-8). Employer also highlights the fact that Claimant did not complete applications for any available jobs and stopped contacting employers after January 10, 2001. (Employer's Brief on Remand, at 8). To this extent, Employer cites *Livingston v. Jacksonville Shipyards, Inc.*, 33 BRBS 524 (ALJ) (1999), and *Simmons v. I.T.O. Corp.*, 24 BRBS 442 (ALJ) (1991), for the proposition that "claimant may not mechanically go through the motions of listing a large number of jobs with no apparent desire to actually gain employment." (Employer's Brief on Remand, at 8).

Employer also urges the court to consider the fact that Claimant refused to meet with Employer's vocational consultant so that a vocational evaluation could be performed. Employer argues that this factor, in combination with the others Employer mentioned, supports a finding that Claimant did not genuinely engage in a genuine employment search. Moreover, Employer asserts that because Claimant "attempt[ed] to thwart the employer's burden to establish suitable alternate employment by refusing to attend a vocational evaluation, even if it is for a labor market survey, the ALJ must construe this factor as mitigating against a finding that the claimant did not diligently market his wage earning capacity." (Employer's Brief on Remand, at 8-9). In support of this proposition, Employer cites several cases, including *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199 (4th Cir. 1984); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981); *Martiniano v. Golten Marine Co.*, 23 BRBS 363 (1990); *Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104 (1988); *Vogle v. Sealand Terminal*, 17 BRBS 126 (1985); *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (1985); and *Anderson v. Ingalls Shipbuilding, Inc.*, 25 BRBS 408 (ALJ) (1991).

Analysis

To sustain his burden of proof that he diligently sought employment, Claimant must establish that he sought alternate employment that is appropriate and consistent with his physical restrictions. He must also establish that he is willing to work. Claimant's task of meeting his burden of proof is hampered by several factors, namely, the underlying motivation for contacting potential employers, issues with the job search records, the inappropriateness of the work sought, and a failure to demonstrate a willingness to work.

First, Claimant's own testimony reveals that he visited the businesses listed in his job search records specifically for the purpose of collecting unemployment benefits from the state of North Carolina, since many of the businesses had advertised for positions which Claimant knew he could not perform under his physical restrictions. (TR. at 36-37). Claimant affirmatively testified that he was required to contact businesses about jobs to collect unemployment. (TR. at 25-28). Claimant has not demonstrated that he was motivated to search for work by anything other than receiving unemployment compensation benefits. This finding is bolstered by Claimant's testimony that, even though he knew that a majority of the businesses that he visited did not have any positions that he could perform, given his physical restrictions, he contacted the businesses anyway for the purpose of completing his job search requirements. While it is noted that Claimant did contact a large number of businesses, such does not overcome the fact that Claimant did not demonstrate any other motivation for contacting these potential employers. I find Employer's argument that Claimant contacted these businesses only for the purpose of collecting unemployment more compelling and supported by the evidence in the record.

An inspection of Claimant's job search records also demonstrates that Claimant did not diligently seek alternate employment. For a majority of the businesses, Claimant did not list the name of the person with whom he spoke about possible job opportunities, nor did he list any job positions that were available or the salary/wage per hour. Claimant listed the name of the person with whom he spoke for only ten jobs, and for those ten businesses, he also listed the hourly wage rate, but failed to list the job position to which that hourly rate applied. These businesses

were: Red Apple Market; Flood's Auto Repair; Food Lion in Ahoskie; Piggly Wiggly in Ahoskie; Wal-Mart in Ahoskie; Advance Auto Parts in Murfreesboro; Chester Powell (a farmer); Duck Thru; East Coast Environmental; and Earl's Body Shop. (CX 3mm, 3nn). While it is not a requirement that Claimant specify to whom he spoke about possible jobs, the fact that he did not list these items does weigh against his credibility as to whether he diligently sought employment.

The Board found that the ALJ did not examine with any specificity any of the jobs Claimant pursued. For a majority of the businesses listed, however, Claimant did not indicate what particular job or position that was available or discussed when he contacted the businesses on his list. Claimant, in his testimony, did identify the following specific jobs/job duties: (1) Farm of Chester Powell—farm help; (2) Duck Thru—cleaning; (3) Georgia Pacific—janitorial work; (4) Golden Skillet—cooking and cleaning positions; (5) Piggly Wiggly—cashier; (6) Lee's Tractor Company—cleaning; and (7) O'Connors Restaurant—cooking and cleaning positions. With the exception of Duck Thru, Claimant did not fill out an application at any of these businesses. Further, Claimant only affirmatively testified that he completed two applications, specifically, at Duck Thru and Wal-Mart. The record also shows that Howell Metal Corporation returned a letter sent by Mr. Kay, responding that Claimant had filled out an application with that business. (EX 9a). There is no other affirmative evidence in the record to show that Claimant submitted applications at any other businesses. Claimant also specifically testified that on three occasions, he was told without even filling out an application that a business would not hire him because he could not walk or move around easily. This occurred at the farm of Chester Powell; Georgia Pacific; and Ace Hardware.

It appears from Claimant's job search records that Claimant contacted nine businesses more than once. For example, it appears that Claimant went to the Wal-Mart in Ahoskie, North Carolina, on May 28, 2000, and again on March 14, 2001. (CX 3h, 3nn). Claimant also visited Duck Thru #4 on two occasions, April 26, 2000, and March 22, 2001. (CX 3c, 3nn). Claimant spoke with Chester Powell on April 26, 2000, and again on March 19, 2001. (CX 3c, 3nn). There are also two entries for the Piggly Wiggly in Ahoskie, one on June 10, 2000, and another on March 7, 2001 (CX 3j, 3nn); two entries for the Advance Auto Parts in Murfreesboro (July 8, 2000, and March 22, 2001); the Food Lion in Ahoskie (July 22, 2000, and March 7, 2001) (CX 3p, 3nn); Flood's Auto Repair (September 23, 2000, and April 5, 2001); Rose Brothers Paving Company (June 24, 2000, and July 8, 2000) (CX 3l, 3n); and Hunter's Funeral Home (September 9, 2000, and December 2, 2000) (CX 3v, 3hh). Therefore, it appears that Claimant contacted approximately seventy different businesses, instead of ninety as Claimant asserts.

Claimant's job search records do contain some of the businesses identified by Employer's vocational consultant in the labor market survey. These businesses were: Food Lion in Ahoskie (cashier position); Wal-Mart in Ahoskie (cashier and greeter positions); Piggly Wiggly in Ahoskie (cashier position); East Carolina Environmental in Aulander (laborer); and Red Apple Market in Ahoskie. (EX 6; CX 3). The cashier and greeter positions were approved by Dr. Holm as appropriate for Claimant given his restrictions. (EX 5). Claimant testified, however, that there were no jobs available at the businesses when he visited them. (TR. at 28-29). According to his records, Claimant visited the Food Lion on July 22, 2000, and March 7, 2001 (CX 3p, 3nn); the Wal-Mart on May 28, 2000, and March 14, 2001 (CX 3h, 3nn); the Piggly Wiggly on June 10, 2000, and March 7, 2001 (CX 3j, 3nn); East Coast Environmental on March

27, 2001 (CX 3nn); and the Red Apple Market on April 2, 2001 (CX 3mm). Claimant testified that he completed an application at Wal-Mart but was never contacted about a job. (EX 7, at 23). Claimant testified that he began filling out an application at the Piggly Wiggly but was told by the manager not to complete it. (EX 7, at 25-26). Claimant also stated that there were no jobs that he felt he could do at Food Lion. (TR. at 32).

In June, 2000, when the labor market survey was conducted, the Food Lion in Ahoskie, Wal-Mart in Ahoskie, and Piggly Wiggly in Ahoskie were all hiring, while East Coast Environmental had just hired an individual for their facility; Mr. Kay was told that East Coast Environmental hires approximately ten people per year. (EX 6g-i). Mr. Kay completed an addendum to the labor market survey in June, 2001. At that time, Mr. Kay noted that the Food Lion and Piggly Wiggly were either hiring or taking applications; Wal-Mart had no openings. Mr. Kay also contacted Red Apple Markets and Duck Thru stores in June, 2001, and was told those businesses were taking applications as well. (EX 5a). The original Decision and Order found that the positions at Food Lion did constitute suitable alternate employment because that business was willing to accommodate Claimant's physical restrictions. (D&O, at 9). The position at Piggly Wiggly was not considered suitable alternate employment because there was insufficient evidence to find that Piggly Wiggly had any job openings. (D&O, at 9). Further, the positions at Wal-Mart and the Red Apple Market did not qualify as suitable alternate employment because there was no evidence that that business would accommodate Claimant's restrictions. (D&O, at 10-11).

Based upon the evidence, I find that the position at Food Lion in Ahoskie was available at the time Claimant visited the store, and that Claimant's failed to submit an application. (See EX 9e). I also find that Claimant failed to submit an application at the Red Apple Market, which also was available during the time Claimant states he visited the store in Ahoskie. (See EX 9g). The failure of Claimant to submit applications to these two businesses contributes to a finding that he did not diligently seek employment.

I also find that Claimant's credibility is weakened based upon the evidence that four letters that were returned to Mr. Kay for various reasons. These letters were sent to Riverside Auto Mart, Ahoskie, North Carolina (returned as "Not Deliverable as Addressed--Unable to Forward"); Duck Thru, Cofield, North Carolina (returned for "No Mail Receptacle"); Rose Brothers Paving Company, Murfreesboro, North Carolina (returned as "Forwarding Order Expired"); and a fourth letter sent to Earl's Body Shop was returned as "Address Unknown." (See EX 9h-i). The fact that the addresses were incorrect on this small sample of the businesses leads me to doubt whether Claimant actually contacted these businesses, or if he did contact them, how diligent he was in actually seeking employment from them. Again, this is not to say that a claimant is required to submit addresses of the businesses he inquires with for potential alternate employment, only that that fact is taken into consideration when determining Claimant's credibility as to his diligence in seeking alternate employment.

Claimant's burden is also hindered by the fact that Claimant did not seek employment that was appropriate and consistent with his physical conditions. Claimant was initially physically restricted from climbing ladders. (D&O, at 7). After he began to experience additional knee problems, his physician gave him further work restrictions, namely, no climbing,

bending, crawling, or standing for long periods of time. (D&O, at 3). However, Claimant testified that he contacted a farmer, Chester Powell, for employment even though he knew prior to visiting Mr. Powell that he could not climb onto a tractor, but that his motivation for doing so was to collect unemployment benefits. (EX 7, at 10). By Claimant's own admission, he was seeking jobs that entailed some type of janitorial or cleaning work or cooking positions, at Duck Thru, Georgia Pacific, Golden Skillet, Lee's Tractor Company, O'Connors Restaurant, despite the fact that Claimant realized that those positions would require a great deal of standing, which he knew he could not do. These types of positions certainly are not appropriate for someone who is unable to bend or stand for long period of time. Because the job search records do not include what type of position Claimant sought or discussed at the businesses he visited, any finding that Claimant sought other appropriate employment is precluded. While it is certainly feasible that the businesses Claimant visited would have jobs that he could have performed given his physical restrictions, no evidence was offered as to what those positions might have been for a majority of the businesses he contacted.

As to Claimant's willingness to work, I find that Claimant's motivation in going to the businesses listed in his job search records was monetary, but was motivated not by his desire to find alternate, appropriate employment, but to collect unemployment benefits. When questioned during his deposition, Claimant responded that he contacted a large number of businesses so that he could collect unemployment benefits; he never stated that he was contacting the businesses for any other reason than that. He further stated that when he contacted many of the businesses, he was of the opinion that there would not be any jobs he could do within his restrictions. He also testified that many of the businesses were hiring for specific positions that he knew he could not perform, but that he visited the businesses anyway to meet his job search requirements. Claimant also testified that he did not follow up with any of the businesses that he contacted to see if their hiring needs had changed. (EX 7, at 23). While the court is mindful of Claimant's testimony as to his transportation issues, this does not overshadow the fact that during the time period when Claimant was not experiencing car problems, he was not diligent in his job search, nor do I find he was willing to work.

Therefore, I find, based upon the evidence, that Claimant did not engage in a diligent search for employment that was reasonably attainable and available nor did Claimant establish that he was willing to work. As a result, Claimant's claim for total disability from April 6, 2000, to the present and continuing must be denied, and he is limited to the permanent partial disability compensation previously paid by Employer due to his scheduled injury.

Order

Accordingly, it is hereby ordered that the claim of Yancy D. Harrell for total disability from April 6, 2000, to the present and continuing is DENIED.

A

RICHARD E. HUDDLESTON
Administrative Law Judge

